

Ultrapower 3, Docket No. QF84-121-000

[61,182]

[¶61,094]

Ultrapower 3, Docket No. QF84-121-000

Order Granting Application for Certification as a Small Power Production Facility

(Issued April 19, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, J. David Hughes, A. G. Sousa and Oliver G. Richard III.

[61,183]

On December 28, 1983, Ultrapower 3 filed an application for certification of a facility as a qualifying small power production facility pursuant to section 201 of the Public Utility Regulatory Policies Act (PURPA) and section 292.207 of the Commission's regulations. Notice of the application was published in the Federal Register on January 10, 1984. ¹ No protests or motions to intervene have been filed.

Ultrapower 3 intends to install a small power production facility with a power production capacity of approximately 11.4 megawatts. It will utilize biomass in the form of waste wood as its primary energy source. Applicant states that there is no planned use of natural gas, oil, or coal and that in no event will their use exceed 25 percent of the total energy input to the facility in any calendar year. Based on the information provided by Ultrapower 3, the facility meets the criteria set out in section 292.204 of the Commission's regulations.

Ultrapower 3 is a general partnership organized under the laws of the State of California. Ultrapower 3 has two general partners: (1) Ultrapower 3, Inc., ² and (2) Rincon Investing Company, a wholly-owned subsidiary of Tucson Electric Power Company. Rincon is defined as an "electric utility" under section 3(17)(c) of the Federal Power Act. Under section 292.206 of the Commission's regulations, the facility can only qualify if Rincon's ownership interest in the facility is no greater than fifty percent. For reasons to be discussed below, we find that Ultrapower 3 meets the ownership criteria of the Commission's regulations.

Under the Joint Venture Agreement entered into between Ultrapower 3, Inc. and Rincon, Rincon will make an initial capital contribution to the partnership of \$5,000,000; Ultrapower 3, Inc. will make an initial capital contribution of \$2,500,000. Ultrapower 3, Inc. will also obtain permits and licenses and provide technological expertise. However, only the cash contribution of Ultrapower 3, Inc. will be included in determining each partner's initial capital contribution. The Joint Venture Agreement provides that each shall have a 50% interest in the venture profits and losses. The Agreement states that, for both accounting and tax purposes, the net profits, net losses, and all items of income, gains, deduction, loss, tax credits or recapture of Ultrapower 3 will be allocated on a fifty/fifty basis. Management decisions are to be made by a policy committee, with each general partner being equally represented on the committee.

Upon liquidation, the distribution of assets shall be made in proportion to the Capital Account balances of each partner existing at the time of the distribution. Once the capital balance of each partner is reduced to zero, the remaining amounts are to be distributed on a fifty/fifty basis.

Under the agreement, initial debt financing is to be raised by loans to Ultrapower 3 from Rincon and Ultrapower 3, Inc. in "the same ratio as, and in an amount not to exceed each general partner's initial capital contribution." Prior to any distribution of assets, Ultrapower 3 is required to repay any debts or liabilities of Ultrapower 3 to the general partners.

Ultrapower 3 states in its application that it is not an "electric utility" under applicable Federal and State law. Citing *Resources Recovery (Dade County, Inc.)*, ³ Ultrapower 3 suggests that the Commission should look to State law to determine the interest in the facility held by each of the participants. Ultrapower 3 is a general partnership incorporated in California. Applicant contends that, under California law, a partner's interest is defined as his share of the profits and surplus. Since the joint venture agreement provides that profits and surplus are to be shared on a fifty/fifty basis, Ultrapower 3 contends that the

arrangement satisfies the ownership criteria set forth in section 292.206 of the Commission's regulations.

Discussion

The ownership criteria governing qualifying small power production facilities appear in section 3(17)(c) of the Federal Power Act. Under that section, a qualifying facility must be

. . . owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).

The regulations implementing this statutory provision state that:

For purposes of this section, a cogeneration or small power production facility shall be considered to be owned by a person primarily engaged in the generation or sale of electric power, if more than 50 percent of the *equity interest in the facility* is held by an electric utility or utilities, or by an electric utility holding company. . . . §292.206(b) (emphasis added).

The Commission's regulations thus equate "ownership interest" with "equity interest." However, the regulations do not define the term "equity interest." The basic issue is how to define equity interest in a partnership. In particular, the question is whether the entitlement to profits, losses, and surplus

[61,184]

should determine the equity interest in a partnership, rather than the contribution of capital to the venture and the entitlement to original contributions upon liquidation of the firm. Applicant states that, in the case of a facility owned by a corporation, ownership should be based upon the relative number of shares of common stock held by the equity holder. In the case of a partnership, the issue is more complicated.

In our view, the entitlement to venture profits, losses, and surplus after return of initial capital contribution, as well as the fact that both partners share equal control of the venture, is dispositive. We regard the entitlement to original capital contribution, before sharing any remaining assets at dissolution, as simply a return of capital and not part of the "equity interest" as that term is used in our regulations. Therefore, in light of the fact that Rincon's control of the partnership and entitlement to benefits do not exceed 50%, we find that Rincon has no more than a 50% equity interest in Ultrapower 3 and that the ownership criteria of section 292.206 of our rules are met.

Although equity may be defined as the residual interest in the assets of an entity that remains after deducting its liabilities⁴ this definition is difficult to apply in the instant case. The initial contribution of capital by the partners may more properly be viewed as debt than equity. We note that this capital contribution conveys no management rights nor does it influence the distribution of profits or gains. However, upon dissolution of the partnership, the initial capital contribution must be returned, prior to any other distribution of assets.

The accounting definition of equity is helpful in determining the total equity of the venture, but it is not particularly helpful in determining the percentage of the equity held by each partner. The assets of the venture are owned on an undivided basis by the partnership.⁵ The partners do not individually own any identifiable assets. There are no shares of stock outstanding. Under these circumstances, we have looked to the stream of benefits from the venture to determine the equity interest of the partners. Under the terms of the partnership agreement, the stream of benefits consists of profits and surplus.⁶

We recognize that in some situations the stream of benefits accruing to each participant may not be identifiable in advance. Moreover, there may be situations in which the ownership of the assets may be directly traced to individual participants. In such cases, the Commission would have to further examine the applicability of the appropriate definition of equity interest. This order is necessarily limited to the facts of this case.

Based on the information provided in the application of Ultrapower 3, the facility satisfies the requirements established in sections 292.203(a) and 292.204 of the Commission's regulations regarding qualification as a small power production facility.

The Commission orders:

The application for certification of qualifying status filed by Ultrapower 3 on December 28, 1983, pursuant to section 292.203(a) of the Commission's regulations and section 3(17)(c) of the Federal Power Act, as amended by section 201 of

PURPA, is hereby granted, provided that the facility operates in the manner described in the application.⁷

-- Footnotes --

¹ 49 Fed. Reg. 1283.

² Ultrapower 3, Inc. is, in turn, controlled by Ultrapower, Inc., a wholly owned subsidiary of Ultrasystems, Inc.

³ 18 FERC ¶61,152 (1982) *reh. den.*, 19 FERC ¶61,104 (1982), *aff'd*, *Florida Power & Light Co. v. F.E.R.C.*, 711 F.2d 219 (D.C. Cir., 1983).

⁴ The term "equity" is defined and discussed in the Financial Accounting Standards Board's Statement of Financial Accounting Concepts No. 3 (Elements of Financial Statements of Business Enterprises) which was issued in December of 1980.

⁵ *See* Corporations Code, Cal. Codes §15025(1)(1977).

⁶ We would be particularly concerned if the utility were to receive any special advantages as a result of the partnership, such as service contracts with favorable terms or the right to loan money to the partnership at non-commercial interest rates. While we would normally presume such agreements would be at arms length if control is shared equally by the utility and non-utility interests, we would examine the details of such arrangements if the circumstances warranted.

⁷ Certification as a qualifying facility serves only to establish eligibility for benefits provided by PURPA, as implemented by the Commission's regulations, 18 C.F.R. Part 292. It does not relieve a facility of any other requirements of local, State, or Federal law, including those regarding siting, construction, operation, licensing, and pollution abatement. Certification does not establish any property rights, resolve competing claims for a site, or authorize construction.